FILED BY CLERK
FEB -2 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ADRIAN CHRISTOPHER GONZALES, II Appellant.	)	2 CA-CR 2009-0363 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082649

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 Adrian Gonzales appeals from his conviction and sentence for sexual conduct with a minor. He argues the trial court erred in imposing a substantially aggravated sentence. We affirm Gonzales's conviction and sentence.

¶2 Viewed in the light most favorable to sustaining Gonzales's conviction, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence establishes that in June 2007, Gonzales had sexual intercourse with his fifteen-year-old cousin, R. After returning to her home in New Mexico several weeks later, she reported the incident to her mother, who took her to a doctor who determined R. was pregnant. R. then had an abortion, and analysis of the fetal tissue indicated Gonzales was the father. Gonzales was charged with sexual conduct with a minor and, after a two-day jury trial, was found guilty as charged.

¶3 Gonzales admitted he had four previous felony convictions and had been on release from confinement at the time of the offense. The court sentenced Gonzales to an enhanced, substantially aggravated, 5.75-year prison term. *See former* A.R.S. §§ 13-604(C); 13-702(B), (C); 13-702.01(E)[1]; *see also* A.R.S. § 13-1405(B). It found as aggravating factors the "[e]motional and physical impact on the victim; impact on the victim's family; [that Gonzales] was on parole at the time of the incident; [and his] other prior convictions."

[1]The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008," *id.* § 120. We refer in this decision to the sentencing statutes as they were worded and numbered at the time of Gonzales's offenses. 2005 Ariz. Sess. Law ch. 188, § 1 (§ 13-604); 2006 Ariz. Sess. Law ch. 148, §§ 1, 2 (§§ 13-702, 13-702.01).

¶4 In order for the trial court to impose a substantially aggravated sentence under § 13-702.01(E), the state had to prove at least two aggravating factors enumerated in § 13-702(C). *See State v. Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d 1016, 1019 (App. 2009); *see also State v. Schmidt*, 220 Ariz. 563, ¶ 11, 208 P.3d 214, 217 (2009). A previous felony conviction is an enumerated aggravating factor, § 13-702(C)(11), as is emotional or physical harm to the victim, § 13-702(C)(9). Because Gonzales's release status is not an enumerated aggravating factor and instead falls under the catch-all provision in subsection (C)(23), it cannot be the sole basis to increase his sentence from an aggravated to a substantially aggravated term. *See Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d at 1019.

¶5 Gonzales does not contest the court's findings related to his prior convictions, nor its reliance on those convictions to enhance and aggravate his sentence. He instead argues the court erred in imposing a substantially aggravated sentence based on his release status and harm to the victim because he did not waive his right to have a jury determine those factors. Other than the fact of a prior conviction, a trial court may only impose a sentence beyond the statutory presumptive sentence based on facts submitted to a jury and proven beyond a reasonable doubt, reflected in the jury verdict, or admitted by the defendant. *State v. Price*, 217 Ariz. 182, ¶ 8, 171 P.3d 1223, 1225-26 (2007); *see also Blakely v. Washington*, 542 U.S. 296, 305 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Gonzales did not raise this argument below and therefore has forfeited it absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). A sentence based on an improper

aggravating factor, however, is fundamental error. *See State v. Alvarez*, 205 Ariz. 110, ¶ 18, 67 P.3d 706, 712 (App. 2003).

¶6 Because Gonzales was entitled to have a jury decide his release status and whether he caused harm to the victim, absent Gonzales's knowing, voluntary, and intelligent waiver of that right, the court could not properly rely on those factors to aggravate his sentence. *See State v. Brown*, 210 Ariz. 534, ¶ 25, 115 P.3d 128, 137 (App. 2005) (waiver of jury trial right on sentencing factors must be knowing, voluntary, and intelligent); *State v. Baker*, 217 Ariz. 118, ¶ 7, 170 P.3d 727, 729 (App. 2007) (jury trial waiver "valid only if the defendant is aware of the right and manifests an intentional relinquishment or abandonment of such right."); *see also State v. Benenati*, 203 Ariz. 235, ¶ 22, 52 P.3d 804, 810-11 (App. 2002) (defendant's release status must be determined by jury). Gonzales's counsel requested before trial that all alleged aggravating factors be tried to the court rather than to the jury. And, as we noted above, when Gonzales admitted to having four previous felony convictions, he also admitted he had been on release from confinement at the time of the offense.

¶7 However, the court did not inform Gonzales of his right to a jury trial before accepting Gonzales's admission that he had four previous felony convictions and had been on release at the time of the offense. Although Gonzales arguably was made aware of his right to a jury trial because he was present when his counsel discussed it with the trial court and requested the court determine aggravating factors, a valid waiver of the right to a jury trial cannot be made through counsel. *See* Ariz. R. Crim. P. 18.1(b)(1) (prior to accepting waiver, court required to "address the defendant personally,

advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent"); *Baker*, 217 Ariz. 118, ¶¶ 9-11, 170 P.3d at 729 (waiver through counsel ineffective). And we cannot presume waiver from Gonzales's admission that he was on release at the time of his offense. *See Brown*, 210 Ariz. 534, ¶ 25, 115 P.3d at 137 (admission not valid for sentencing purposes absent jury trial waiver). Accordingly, the court erred by implicitly finding Gonzales had waived his right to a jury trial on aggravating factors.

¶8 As to the trial court's reliance on his release status, however, Gonzales has not demonstrated he was prejudiced by any error. Based on the documents submitted at sentencing demonstrating his previous felony convictions, any reasonable jury would have concluded Gonzales was on release from confinement at the time of the offense. *See Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d at 609 (defendant demonstrates prejudice if "reasonable jury applying the correct standard of proof could have reached a different conclusion than did the trial judge").

¶9 But, as we have explained, absent the enumerated factor of harm to the victim, the trial court was not permitted to impose a substantially aggravated prison term. *See Perrin*, 222 Ariz. 375, ¶ 9, 214 P.3d at 1019. The state argues Gonzales was not prejudiced by the court's reliance on this factor because no reasonable jury could have concluded Gonzales's conduct did not harm R. As the state points out, R. testified the intercourse had not been consensual—she stated she repeatedly had told Gonzales to stop but that he nonetheless held her down and removed her clothes despite her efforts to prevent him from doing so. And she testified the incident had caused her emotional

distress—stating that, after it was over, she "r[a]n to the bathroom, and . . . stayed in there for awhile crying" and that she returned to her home in New Mexico because she was "scared." She also testified that, after having the abortion, she felt "hurt."

¶10 This evidence plainly supports a jury finding that Gonzales had caused harm to R., and, we agree with the state that no reasonable jury could have found otherwise. The state gave Gonzales notice that it was seeking an aggravated sentence based, in part, on "[p]hysical and emotional harm caused to the victim." Despite that notice, Gonzales did not present at sentencing any evidence that the encounter was consensual or that contradicted R.'s testimony. Nor did he argue at sentencing that her testimony on that subject was incredible.

¶11 And, even if we accept, arguendo, Gonzales's argument that a jury might have found R.'s testimony incredible, no reasonable jury could conclude the incident did not cause R.'s pregnancy and the abortion that followed. An unwanted pregnancy constitutes physical harm. *See United States v. Asberry*, 394 F.3d 712, 717 (9th Cir. 2005) (statutory rape "crime of violence" because "physical risks of pregnancy among adolescent females are 'injuries' as the term is defined in common and legal usage"), *quoting Oxford English Dictionary* (2d Ed. 1989); *People v. Sargent*, 150 Cal. Rptr 113, 115 (Cal. Ct. App.) ("Pregnancy resulting from rape is great bodily injury."); *Fenelon v. State*, 629 So.2d 955, 956 (Fla. Dist. Ct. App. 1993) ("[P]regnancy and childbirth resulting from a sexual battery constitute physical injury."); *State v. Jones*, 889 S.W.2d 225, 231 (Tenn. Crim. App. 1994) (unwanted pregnancy is "personal injury"). Thus, Gonzales has not demonstrated the result could have been different had a jury and not the

trial court determined whether he had caused R. emotional or physical harm. *See Henderson*, 210 Ariz. 561, ¶ 28, 115 P.3d at 609.

¶12 For the reasons stated, we affirm Gonzales's conviction and sentence.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Judge